

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

RENZENBERGER, INC.

and

CHAUFFEURS, TEAMSTERS AND
HELPERS, LOCAL UNION NO. 150,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Cases 20-CA-31176
20-CA-31331
20-CA-31405
20-CA-31546
20-CA-31696
20-CA-31718
20-CA-31756

David B. Reeves, Esq. and Ashok Carlos

Bokde, Esq. of San Francisco,
California, for the General Counsel

Terry Skjelstad, Business Representative,
of Sacramento, California, for the
Charging Party

Daniel B. Boatright, Esq., of Kansas City,
Missouri, for Respondent, *Bill Dunfee,*
Regional Manager, and Al Orheim,
Negotiator, of Sacramento, California,
for Respondent

DECISION

Statement of the Case

Mary Miller Cracraft, Administrative Law Judge: At issue are allegations that Renzenberger, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act),¹ as follows:

- Section 8(a)(1) violations by interrogation and threats;
- Section 8(a)(1) and (3) violations by discharge of two employees for their activities on behalf of Chauffeurs, Teamsters and Helpers, Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO (the Union); and

¹ Sec. 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. §158(a)(1), provides that it shall be an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,” which secures the rights of employees, inter alia, “to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . [and] to refrain from any or all such activities” Sec. 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), provides, inter alia, that discrimination which encourages or discourages membership in a labor organization is an unfair labor practice; and Sec. 8(a)(5) of the Act, 29 U.S.C. §158(a)(5), requires in relevant part that an employer bargain in good faith with the representatives of its employees.

- Section 8(a)(1) and (5) violations:

5

- by failure to provide the Union with information necessary for and relevant to the Union’s duties as the exclusive collective-bargaining representative of employees;

10

- by failure to bargain about the termination of employee Brady Jones; and

- by bargaining in bad faith with the Union in violation of Section 8(d)² of the Act by making proposals intended to thwart the parties’ agreement on a collective-bargaining agreement.

15

On the entire record,³ including my observation of the demeanor of the witnesses,⁴ and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

Findings of Fact

20

I. Jurisdiction and Labor Organization Status

25

Respondent is a Kansas corporation engaged in crew transportation services for railroads. It has facilities in various locations in California including an office and place of business in Roseville, California. During calendar year 2002, Respondent provided services valued in excess of \$50,000 directly to customers located outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

30

² Sec. 8(d) of the Act, 29 U.S.C. Sec. 158(d), provides in relevant part, that to bargain collectively is the performance of the mutual obligation of the employer and [in this case, the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

35

40

³ Trial was in Sacramento, California, on March 31 and April 1, 2004. All charges were filed by the Union, as follows: The charge in Case 20-CA-31176, on April 10, 2003; the charge in Case 20-CA-31331, on June 11, 2003; the charge in Case 20-CA-31405, on July 29, 2003; the charge in Case 20-CA-31546, on October 21, 2003; the charge in Case 20-CA-31696, on January 12, 2004; the charge in Case 20-CA-31718, on February 2, 2004, and the charge in Case 20-CA-31756 on February 26, 2004. The second amended consolidated complaint, the relevant pleading herein (as amended at hearing) issued on March 15, 2004. All dates are in 2003 unless otherwise referenced.

45

50

⁴ Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

II. Unfair Labor Practices

A. Background

5 Respondent provides crew transportation for railroads at various train yards throughout the United States. The events in this case took place at the Union Pacific train yard located in Roseville, California, about 20 miles east of Sacramento, California. Respondent employs “yard drivers” and “road drivers” at this location. Generally, Respondent’s yard drivers pick up fresh crews at the yard office and deliver them to the train. The yard drivers also pick up the departing crews from the train and deliver them to the yard office. Respondent’s road drivers pick up fresh crews and deliver them to the yard office and pick up departing crews at the yard office and transport them to their destination, sometimes 100 to 300 miles away.

15 The United Transportation Union (UTU) was certified in March 1999 to represent a unit of Respondent’s drivers in southern and northern California, including the employees at the Roseville, California yard. No collective-bargaining agreements were executed during the period of UTU’s representation. The southern California drivers decertified the UTU in June 2001. By memorandum, Respondent thanked the southern California drivers for their decertification vote and announced pay increases and a holiday benefit. Respondent sent a copy of this
20 memorandum to each of its northern California drivers as well. A proceeding to decertify the UTU in northern California, Case 20-RD-2319, was thereafter filed.

On December 17, 2002, the Union intervened in the proceeding to decertify the UTU. In January 2003, employees voted by mail ballot to determine whether the northern California drivers would retain UTU as their exclusive collective-bargaining representative, select the Union as their exclusive collective-bargaining representative, or decide to have no exclusive collective-bargaining representative. The Union received 11 of 21 votes, a majority of the valid votes counted. There were no determinative challenges. On February 11, 2002, UTU was decertified and the Union was certified as the exclusive collective-bargaining representative of
30 the following appropriate unit of employees:

All full-time and regular part-time road and yard drivers employed by Respondent at its Richmond, Oakland, Dunsmuir, Stockton, Fresno, and Roseville, California locations; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.
35

There are about 60 unit drivers. Forty of the drivers are located in Roseville.

B. Alleged Interrogation and Threats

40 It is undisputed that in August and September, after about five or six negotiation sessions, there were employee discussions about going on strike. In late August or early September, Regional Manager Bill Dunfee telephoned yard driver James Lawhead. According to Lawhead, Dunfee asked if Lawhead was going to work if there were a strike. Lawhead
45 responded that he would do what the other employees did. Dunfee stated, according to Lawhead, that if employees struck, they would be terminated.

Dunfee recalled speaking with Lawhead and asking if he would drive if there were a strike. Dunfee remembered telling Lawhead about informational pickets posted by the Teamsters Union on Respondent’s customer’s property in Nebraska. Within two hours of the appearance of pickets, Respondent’s customer replaced Respondent with a competitor. Dunfee
50 cautioned Lawhead “that if anybody was to go out on the Union Pacific property in Roseville,

California with a picket sign, more than likely, the Union Pacific Railroad would replace us immediately with Milepost Industries [a local competitor].” Dunfee also recalled urging Lawhead to show up for work if there was a strike. Dunfee explained that he was obligated to supply vans whether there was a strike or not.

5

There is little discrepancy between Lawhead’s and Dunfee’s testimony regarding the alleged interrogation. Both agree that Dunfee asked Lawhead if he would work if there were a strike. Moreover, it is unnecessary to resolve the difference in their testimony regarding what would happen if employees struck.

10

The parties agree that an employer may ask employees if they intend to work during a strike if the employer has a reasonable basis to believe that a strike is imminent and the question is not accompanied by a threat, promise, or other coercive conduct. See, e.g., *Mosher Stell Co.*, 220 NLRB 336 (1975), *enfd.* 532 F.2d 1374 (5th Cir. 1976), cited by both parties. Respondent has not produced evidence supporting a reasonable basis to fear an imminent strike. Rather, the record indicates only rumor and speculation that a strike might be called. Certainly, the record does not contain evidence of a strike vote having occurred or being called. On this basis, I find that Dunfee’s questioning of employees regarding willingness to work during a strike was not supported by a reasonable basis to fear an imminent strike and thus reasonably tended to coerce employees in violation of Section 8(a)(1) of the Act. See, generally, *Fremont Ford*, 289 NLRB 1290 n. 6 (1988); *Hedaya Bros.*, 277 NLRB 942, 955 (1985); *Great Southern Construction, Inc.*, 266 NLRB 364, 376 n. 15 (1983).

15

20

25

In addition, no matter whether Dunfee or Lawhead’s testimony is credited, I find a threat of discharge in the event of a strike. Thus, the interrogation was accompanied by an unlawful threat and would be unlawful even if there were a reasonable basis to fear an imminent strike.

30

In *NLRB v. Gissel Packing Company*, 395 U.S. 575, 618 (1969), the Court held that in order to be lawful, a prediction about unionization, “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. . . .” Dunfee’s testimony indicates that he based his prediction on one event in Nebraska regarding an unspecified customer. It is unclear whether the customer in Nebraska was Union Pacific, the customer at the Roseville yard. Dunfee’s testimony, accordingly, lacks objective fact to support a demonstrably probable consequence. Thus, Dunfee’s version of his statement to Lawhead reasonably tended to coerce employees. Lawhead’s testimony does not indicate that there was any basis for Dunfee’s statement to Lawhead that employees who struck would be discharged. In either case, the record supports a finding that Dunfee threatened termination if employees struck. Accordingly, I find that either version of Dunfee’s statement reasonably tended to coerce employees and violated Section 8(a)(1) of the Act.

35

40

For the same reasons, the un rebutted testimony of yard drivers Renae Halverson and Michelle Lord also supports a finding that they were threatened with termination for going on strike. On two occasions, Halverson spoke to supervisor Lillian Nuyocks about strikes. On August 13, while at the Roseville yard in the area where the vans are parked, Halverson asked Nuyocks what a strike consisted of and whether employees would be fired if they struck. According to Halverson, Nuyocks replied that if employees struck, they would be fired – their jobs would be terminated.

45

50

On another occasion, Halverson and other drivers spoke about striking while they were gathered in the yard on August 22. When a driver indicated that she would have to cross the picket line in order to maintain her income and pay her bills, Halverson joked, “It’s okay if you cross a picket line, you know, we won’t key your car.” Nuyocks approached upon hearing

Halverson’s comment about “keying” a car. Nuyocks told the employees that it did not matter; if any of them struck, they would lose their jobs anyway. Nuyocks added that she would lose her job too. Michelle Lord also spoke to Nuyocks about what would happen if there were a strike. Nuyocks responded that if there were a strike, “I’m out of here and we’re all going to be out of here.” Nuyocks did not testify. Nuyocks’ statements to both Halverson and Lord reasonably tended to coerce employees and violated Section 8(a)(1) of the Act.

C. Section 8(a)(3) Allegations

10 1. Renae Halverson

a. Facts

15 In May, Renae Halverson began working for Respondent as a part-time yard driver. She converted to full time in late July or early August. She worked the “graveyard” shift with hours from 9 p.m. to 5 a.m., or 10 p.m. to 6 a.m., or 11 p.m. to 7 a.m. Halverson was discharged in December for excessive absence and tardiness.

20 Halverson was an open Union advocate. She spoke to her supervisor, Lillian Nuyocks, about going on strike and about bringing her horse trailer to the work site to support a strike. Her stated intention was to place a Union sign on the trailer.

25 Respondent’s employee handbook requires that drivers notify their “immediate supervisor as soon as possible whenever necessary absence from work is expected.” Unexpected absence or tardiness due to illness or emergency similarly requires notification of the employee’s immediate supervisor as soon as possible. The handbook warns that failure to provide advance notice of an absence will result in disciplinary action up to and including termination.

30 The handbook additionally provides, “Excessive excused and/or unexcused absences or tardiness will be subject to the Company’s Corrective Discipline program.” The corrective discipline program consists of “verbal warning, written warning, suspension and termination.” Respondent’s stated philosophy is “that discipline must, whenever possible, be corrective rather than punitive.” The corrective action policy for repeated unexcused tardiness or unexcused absence in any 6-month period, as revised May 18, is set forth as follows:

- a. The third tardy/absence will result in a verbal warning.
- b. The fourth tardy/absence will result in a written warning.
- c. The fifth tardy/absence will result in a 2-day unpaid suspension.
- 40 d. The sixth tardy/absence will result in a 4-day unpaid suspension.
- e. The seventh tardy/absence will result in termination.

45 The prior handbook, effective January 18, required a verbal warning for the third tardy or absence in a 6-month period; a written warning for the fourth; and termination for the fifth. The pre-January 18 policy is not in evidence. Neither the January nor the May handbook rule distinguishes between excused and unexcused absence for purposes of instituting corrective action.

50 Respondent’s personnel records indicate that Halverson was verbally warned for an incident on June 22 for failure to notify her supervisor in a timely manner that she was unable to work her shift. Halverson received a “first and final” corrective action because she was 30 minutes late for her assigned shift on November 17 and did not notify her immediate supervisor

in a timely manner so that a relief driver could be found. On December 1, Halverson was again 30 minutes late for her assigned shift. However, the corrective action did not mention that Halverson failed to notify her supervisor of expected tardiness. In any event, Halverson was suspended for 3 days on that occasion. On December 9, Halverson received a “final warning” stating she was 30 minutes late. The personnel record does not indicate that Halverson failed to notify her supervisor of this expected tardiness.

On Monday, December 15, Halverson left work due to illness. She did not report for her evening shift on Tuesday, December 16. According to Halverson, on the afternoon of December 16, she called Lillian Nuyocks, her supervisor, and left a message stating that she continued to be ill and would not be at work on the evening of December 16. Halverson reported to work on December 17. Another driver was in her van. Halverson called Nuyocks to find out why another driver was in her van. Nuyocks told Halverson that she was suspended pending investigation because she failed to call to report her absence of December 16. Halverson protested that she had called in and would get her phone records to prove it. Nuyocks told Halverson to call Dunfee.

Halverson reached Dunfee by phone. Dunfee informed Halverson that she was suspended for failing to call to report her December 16 absence. Dunfee explained the suspension would last until Dunfee heard from regional manager Eddie Sinclair on the following Monday morning, December 22. Nevertheless, Halverson called Dunfee on Thursday, December 18. Dunfee referred Halverson to Lonna Anderson of human resources at Respondent’s corporate office in Kansas. Halverson called Anderson who advised Halverson to fax her records, including the phone records, to the corporate office. Halverson did so. Halverson’s phone records, which she faxed to Anderson, confirm a one-minute call to Nuyocks’ cell phone on the afternoon of December 16.

Halverson contacted Dunfee around 3:30 p.m. on December 22. Dunfee stated that he still had not heard from Sinclair. Later in the afternoon, Sinclair and Dunfee made a conference call to Halverson. Halverson was told that she continued to be suspended. However, Sinclair stated that the reason for the suspension was excessive tardiness and absence. On December 23, Sinclair informed Halverson that she was terminated.

Respondent’s personnel records contain Halverson’s termination report stating that Halverson was fired for consistent tardiness or absence. It is dated December 22 and shows the termination date as December 19. A December 23 e-mail from Lonna Anderson to president Bill Smith states,

Renee [sic] did fax me her phone records that show a 1-minute call to Lillian’s cell phone on the afternoon in question. Eddie states that they printed out Lillian’s cell phone records that show no record of a call from Renee’s number. Eddie has decided to terminate her anyway because of her poor attendance (she has 4 prior corrective actions for attendance). Should she contact me again, I will simply direct her through her chain of command.

Nuyocks maintains attendance records for all drivers that she supervises. These records, although stipulated into the record, were not explained because Nuyocks did not testify. For what they are worth, Halverson’s attendance records reflect the following: June 22, unexcused absence; September 12, unexcused absence; October 28, excused absence; November 3, excused absence; November 5, tardy; November 6, excused absence; November 13, tardy; November 17, tardy; December 1, tardy; December 7, unexcused

absence; December 9, tardy; December 15, excused absence – illness; December 16, unexcused absence. Halverson’s are the only records completed for November and December. Dunfee was unable to explain why other employees’ records were only partially completed.

5 The attendance records are secondary documents. The actual terminal and yard activity log is the original document showing time in and time out. Halverson testified that she was not tardy on December 9. Although General Counsel subpoenaed Halverson’s terminal and yard activity log for December 9, the wrong log was inadvertently furnished and the correct log was never produced. Under these circumstances, I credit Halverson’s testimony that she was not
10 tardy on December 9. I also credit Halverson’s testimony that she reported her illness to Nuyocks on December 16. Thus, in a six-month period, Halverson had three unexcused absences, four excused absences, and five tardies. She received corrective action for three of the five tardies.

15 During calendar years 2002 and 2003, eleven drivers, other than Halverson, were terminated for attendance problems. Respondent’s personnel records indicate that nine of these drivers abandoned their jobs by failure to call or appear for work for over three days. There is no further explanation other than “attendance” for the tenth driver’s discharge. The final driver, other than Halverson, was discharged because he was late everyday for training and blamed
20 his tardiness on everyone else.

 Respondent’s attendance records indicate that other employees were absent or tardy without incurring corrective action. For instance, Karen Erdman received no discipline for 14 absences and 5 tardies in 3 months. The same is true for Michelle Lord, who had 8 absences and 2 tardies in a 6-month period; Jim Brossard, 16 absences in a 6-month period; Wilbur Davis, 10 absences in May; and Angela Ritchie, 8 absences in June and July. With regard to Ritchie, no action was taken until August when she failed to call or report for 3 consecutive days. Similarly, Wilbur Davis had 6 absences in February and Samantha Prindle had 19 absences. None of these employees received corrective action.

30

b. Analysis

 In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that
35 protected conduct was a “motivating factor” in the employer’s decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent’s knowledge of the protected activity, Respondent’s animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees’ union activity. *American Gardens Management Co.*, 338 NLRB No. 76, slip opinion at 2 (Nov. 22, 2002), citing *Taylor & Gaskin, Inc.*, 277 NLRB 563 n.2 (1985), both incorporating *Wright Line*, *supra*.

45

 Respondent contends that Dunfee and Sinclair, the managers who made the decision to discharge Halverson, had no knowledge of Halverson’s Union activity. However, the record supports a finding that Halverson’s supervisor, Lillian Nuyocks, knew that Halverson was an enthusiastic Union advocate who planned to support any future strike by bringing her horse trailer to the site with a Union sign on it. Indeed, all managers of Respondent were aware,
50 generally, of Union activity in that the employees had recently voted by a narrow margin, 11 to 10, to certify the Union. Negotiations were ongoing. Management, specifically Dunfee, was

aware of unspecified rumors of strike. Under these circumstances, Nuyocks' knowledge is imputable to Respondent. See, e.g., *Glasforms, Inc.*, 339 NLRB No. 144, slip opinion at n.6 (Aug. 21, 2003); cf., *Music Express East*, 340 NLRB No. 129, slip opinion 1-3 (Nov. 28, 2003).

5 Respondent's animus toward the Union activity is amply illustrated by its interrogation of all employees about whether they would cross a picket line, its threats of discharge if employees went on strike, and an invitation to northern California employees to decertify UTU in order to get raises. A nexus between Halverson's Union support and her discharge exists. I infer this
10 nexus based upon disparate treatment of Halverson, departure from past practice, and shifting reasons given for the suspension pending investigation and the discharge.

As Respondent's attendance records clearly illustrate, at least seven employees whose absence and tardiness warranted corrective action pursuant to the employee handbook. None of them was disciplined. Three of them had more absences and tardiness than Halverson. Thus,
15 Respondent treated Halverson differently than the other employees, departing from its past practice of overlooking absence and tardiness from established employees. Nine of the ten employees who were terminated for absence or tardiness failed to call in or report for three consecutive days. Another was discharged after training. Based on disparate treatment of
20 Halverson and departure from its past practice of ignoring absence and tardiness, I infer a nexus between Halverson's Union activity and her discharge.

Similarly, Respondent's records reflect that Halverson was initially placed on suspension pending investigation because Respondent believed she had failed to call to report that she would be absent for the evening shift on December 16. However, when Halverson produced her
25 phone records showing a call during the afternoon of December 16, Respondent decided to discharge her anyway – but not for failure to call about her absence. Respondent's reason switched to excessive absenteeism and tardiness. This indicates that Halverson was going to be discharged and Respondent was simply searching for a neutral reason for the discharge. Under these circumstances, I infer that Halverson's Union activity was a basis for the discharge.
30

Accordingly, I conclude that the General Counsel has proven, by a preponderance of the evidence, that protected conduct was a "motivating factor" in Respondent's decision. Thus, the burden shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the employees' union activity.
35

Respondent claims that no other employee had such a dismal attendance record. Thus, Respondent argues, Halverson would have been discharged regardless of her Union activity. This assertion is belied by Respondent's records, as interpreted by the employee handbook. For disciplinary purposes, Respondent's handbook makes no distinction between excused and
40 unexcused absences. Respondent's argument relies on a distinction between such absences. However, when viewed through the lens of the employee handbook, and without further explanation regarding the entries Nuyocks made and why only Halverson's entries are completed, Halverson's attendance record, although not exemplary, was better than several other employees' records. None of these other employees was disciplined. Therefore, I am
45 unable to conclude that Halverson would have been discharged in any event. Based on the record as a whole, I find that a preponderance of the evidence warrants the conclusion that Halverson was discharged because of her Union activity, in violation of Section 8(a)(1) and (3) of the Act.
50

2. Joe Burch

a. Facts

5 The complaint alleges that Respondent's written warning, 3-day suspension, and ultimately, the discharge of Joe Burch violated Section 8(a)(1) and (3) of the Act. Burch worked as a yard driver and backup relief road driver. He regularly received safety awards including cash awards, certificates, and pins. Burch served on the Union negotiating committee, attended the negotiation session on November 12, and was an open Union supporter. He spoke to Lillian Nuyocks about his support for the Union prior to Nuyocks becoming his supervisor.

(1) Written Warning

15 According to the Employee Handbook, "It is important to maintain a pleasant, courteous, and businesslike manner in all interactions while representing Renzenberger, Inc., including interactions with our customers, vendors, and other employees." Disregard of customer and vendor relations is subject to corrective action.

20 On December 30 at about 9 a.m., Burch observed a road van with a cracked windshield. He knew that a new road driver intended to drive the van into the mountains that day, where it was snowing. Burch believed the condition of the windshield made such a drive unsafe. Burch called Nuyocks and left a message on her phone reporting his safety concern to her. Burch then asked two other drivers if they had Dunfee's phone number because Burch wanted to call Dunfee since he could not reach Nuyocks. Neither of these drivers had Dunfee's phone number. 25 Next Burch decided to report the situation to Bill Goldsberry, a Union Pacific manager. Burch did so and then left the area.

Burch received a corrective action form dated December 30, marked "1st Action" for "Disregarding customer and vendor relations." The details portion of the form stated,

30 This type of action will not be condoned. You must follow all company rules, policies and procedures. Mr. Burch failed to notify Local or Regional managers of a potential safety issue with a road van in Roseville CA. He instead told a Railroad manager of the issue. All employees are required to notify 35 Renzenberger managers of any and all vehicle or employment issues, not the railroad.

40 Nuyocks did not testify. However, Dunfee averred that Nuyocks told him that she did not receive a call from Burch. Although Burch received corrective action, the road driver was not disciplined for failure to report a safety problem.

(2) Suspension

45 On January 13, 2004, Burch noticed that the brake pedal in his assigned van depressed completely to the floor. Burch did not attempt to contact Nuyocks or Dunfee about the brake pedal. Instead, he noted the problem on his terminal and yard activity log and then operated the van for three hours, from 6 a.m. to 9 a.m. At 9 a.m., Union Pacific employee Bobby Tudsbury conducted a random inspection of Burch's van as part of Union Pacific's safety program. When she completed her examination, she inquired of Burch whether anything was wrong with the 50 van. Burch replied that the brake pedal went to the floor. Tudsbury checked the brake pedal and then asked Union Pacific manager of train operations Linda Pitchford to examine the brake pedal. Pitchford did so and stated that she wanted the van placed out of service.

Burch received a 3-day suspension corrective action for disregarding customer and vendor relations. The details portion of the form stated,

5 This type of action will not be condoned. You must follow all company rules, policies and procedures. Mr. Burch failed to notify Local or Regional managers of a potential safety issue with a yard van in Roseville CA. He instead told a Railroad manager of the issue. Mr. Burch told the railroad manager that he was a retired mechanic and that the company vehicle was unsafe. All employees are required to notify Renzenberger managers of any and all vehicle or employment issues, not the railroad.

(3) Termination

15 Respondent requires its drivers to place an orange cone at the driver's front tire while waiting for passengers. When all passengers are seated in the van, the driver must get out of the van, pick up the orange cone, walk the perimeter of the van around the front and passenger side, place the orange cone in the rear cargo area of the van, and return to the driver's seat. In this manner, the driver will have the opportunity to examine the exterior conditions in and around the van before driving away.

20 Respondent also requires that before backing a van, the driver and all passengers leave the vehicle. The driver must survey the area behind the van to ensure that nothing is in his way. Then the driver may back up and, once the backing is concluded, the passengers may resume their seats in the van.

25 On Burch's third day of work following his suspension, Dunfee observed Burch violate both of these policies. There is no dispute that Burch violated these policies. However, Burch cites mitigating circumstances.

30 According to Burch, on January 27, 2004, around 9 or 9:30 a.m., two members of a crew came to his van. He got out, picked up the orange cone, surveyed the exterior while walking around the van, placed the cone in the back, and reseated himself. At that point, one of the seated crew explained they were waiting for a third crew member who would arrive a few minutes later. Rather than place the cone outside while waiting for the third crew member, Burch remained in the van. The third crew member arrived about 10 or 15 minutes later, and Burch departed without conducting another visual check of the exterior.

40 Burch dropped this fresh crew at the train and picked up a departing crew that had just worked a 12-hour shift. In order to return to the station, Burch basically executed a U-turn but was unable to complete it due to the proximity of a small creek. He had to back up. Burch testified that the crew did not want to get out. With the crew in his vehicle, and without making an exterior check himself, Burch testified he backed up about one foot and then continued to the station. Dunfee, who was watching from the station, estimated Burch backed 15 to 20 feet.

45 At noon, Nuyocks gave Burch a corrective action form stating that he was suspended pending investigation of the policy violations. The details set forth on the corrective action form stated,

50

5 This type of action will not be condoned. You must follow all company rules, policies and procedures. Driver was seen backing his vehicle with a crew on board. (Crew was picked up from the UP7033 at east Atkinson.) Driver did not walk behind his company vehicle prior to backing. Driver did not properly follow the orange cone policy prior to moving his vehicle in front of the J.R. Davis yard. He placed the cone in the rear of the vehicle and sat in the vehicle, awaiting the crew to finish loading their gear. (Timed at over 10 minutes.)

10 On February 4, 2004, Nuyocks called Burch at home and told him that he was terminated. She asked him to come to the office to collect his final paycheck. A termination report was placed in Burch's personnel file. However, he was not shown this report. It stated,

15 Driver was seen backing up with a crew in the vehicle & Not following the backing policy (walking Behind the vehicle before backing). Driver also parked his company vehicle with a flat tire and traded out vehicles Without changing the flat tire or contacting local management about the issue.

20 Burch recalled parking a van with a flat tire and taking another van to get a crew that was waiting for him. According to Burch, he told Nuyocks that he was parking the van with the flat and taking another van to get a waiting crew. He told her he would fix the flat when he returned. Burch testified that he did fix the flat later that day and reported to Nuyocks that the flat was fixed. She said thank you. On February 20, 2004, Nuyocks called Burch and asked him to come to the office to pick up some things. When Burch arrived, Nuyocks gave him a safety award, a check for \$24, a pin, and a Renzenberger brief case.

25

b. Analysis

30 Burch attended one negotiation session in November as a member of the Union committee. Prior to this time, he spoke to employees, including Lillian Nuyocks (who later became his supervisor) about his support for the Union. Thus, Respondent knew of Burch's Union activity and sympathy. Respondent's animus for its employees' Union activity has already been noted. I find a nexus between Burch's Union activity and the adverse employment actions taken against him based upon disparate treatment, departure from past practice, and shifting reasons for the actions taken.

35

40 Turning first to the written warning and the suspension, three employees other than Burch have been disciplined pursuant to this rule. On December 3, 2001, driver Dodig stopped for 2 ¼ hours during a trip, without informing dispatch of delay in the trip. Dodig received a "final warning." Dodig had received two "first warnings" and two "verbal warnings" for unrelated matters prior to the "final warning." Driver Fisher received a "first action" in September 2002 for sleeping in a company vehicle while on Union Pacific property. One month earlier she received a "first warning" for negligently hitting a parked train. In 2000, driver Perry used profanity to his supervisor while on Union Pacific property, calling her "a piss poor excuse for a manager." He was given a 3-day suspension. He received 4 additional corrective action notices in 2001 and quit when he received the last of these, another 3-day suspension.

45

50 Certainly, Respondent may enforce its safety and customer-relations rules in any manner it deems necessary, as long as these rules are not indiscriminately enforced against Union supporters because of their Union activity. Burch may have given Union Pacific the impression that Respondent's vehicles were not safe when he told Union Pacific on two occasions that there were problems with vehicles. However, if safety and customer relations were the impetus for the actions against Burch, one would expect that the driver who went into

the snowy mountains with a cracked windshield would also be disciplined. This did not occur. One might also expect that once Union Pacific ordered a van set aside for a brake problem that Respondent would take action to show the customer that every precaution for safety was being taken. However, in that instance Dunfee came to the site, proclaimed that nothing was wrong with the brakes, and ordered Burch to drive the van away. These actions tend to belie the safety and customer relations concerns voiced by Respondent in instituting the corrective action. Moreover, other drivers disciplined for customer-relations problems were not as severely punished. Accordingly, I find that the General Counsel has established that Burch's Union activity was tied to the adverse employment actions. Thus, a preponderance of the credible evidence proves that a motive for the written warning and suspension was Burch's Union activity.

Burch was suspended pending investigation for the stated reason that he failed to follow the orange cone policy and failed to follow the policy for backing a van. However, he was discharged for failure to follow the policy for backing a van and failure to fix a flat tire. Thus, the reasons shifted. Burch was never told that the flat tire was a factor in his discharge. This unexplained shift in the stated reason for discipline is troubling. Moreover, Respondent presented no first-hand evidence regarding the flat tire incident. Additionally, I note that other employees have not been discharged on a first offense for failure to follow the correct backing procedures. Thus, driver Tennison received a first and final warning in November 2003 for backing with a crew on board. He was discharged when he did the same thing again in February 2004. Driver David backed into a parked car with a crew on board. He was discharged for this. However, when backing causes no collision with a crew on board, Respondent's policy is to issue a corrective notice informing the employee that a second violation will result in discharge. Finally, it is particularly disturbing that Nuyocks, the only witness to the flat tire incident, did not testify. Based upon the record as a whole, I find that Respondent's warning, suspension and discharge of Burch was motivated by his Union activity in violation of Section 8(a)(1) and (3) of the Act.

D. Section 8(a)(5) Allegations

1. Failure to Furnish Information

a. Facts

By letter of May 28, the Union requested that Respondent furnish copies of all employee health benefit plans, copies of all current job descriptions, and copies of all disciplinary notices, warnings or records of disciplinary personnel actions from February 2002 through February 2003. The Union requested this information in order to prepare for bargaining. The parties stipulated that Respondent has not yet furnished copies of all employee health benefit plans and copies of all current job descriptions. The parties further stipulated that on September 3, Respondent furnished incomplete documentation of the requested disciplinary notices. This information was furnished not for the period February 2002 through February 2003, as requested, but for the period August 2002 through August 2003. Respondent's chief negotiator Al Orheim testified that he selected a different period than the one requested by the Union because he thought that until February 11, the UTU represented employees.

By letter of March 11, the Union requested all drivers' logs for unit employees for the period September 2002 through March 2003. The Union requested this information to investigate drivers' charges that they were given insufficient rest time. On May 30, Respondent

furnished this information but for the period December 1, 2002 through May 30, 2003, rather than the period specified by the Union. Thus, the Union did not receive drivers' logs for September, October, and November 2002.

5 By letter of June 5, the Union requested, inter alia, copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year and the make, model and serial number of the radar unit used to determine speed violations. These items were requested in order to investigate the discharge of unit member Brady Jones on May 22 for speeding. By letter of July 12, Orheim stated that Dunfee would supply the make, model and serial number. In 10 late July or early August, Skjelstad received the manufacturers booklet for the radar gun. Copies of disciplinary notices, warnings or records of disciplinary personnel actions for the last year were not provided.

15 b. Analysis

A component of the duty to bargain collectively is a requirement that an employer provide relevant information necessary for the proper performance of the union's duties. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). This includes the duty to provide information relevant to investigation of 20 potential grievances. *DaimlerChrysler Corp.*, 331 NLRB 1324 (2000), enf'd. 288 F.3d 434 (D.C. Cir. 2002). The good faith of a refusal to furnish information is immaterial. *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1113 (1999). The union's ability to obtain the requested information through alternate means does not excuse the employer's duty to furnish it. See, e.g., *BP Exploration (Alaska), Inc.*, 337 NLRB No. 141 (June 26, 2001). An employer 25 must produce the requested information as promptly as possible. *Woodland Clinic*, 331 NLRB 735, 736 (2000).

Respondent does not contend that any of the information requested by the Union was irrelevant to the Union's duties as exclusive collective-bargaining representative. Respondent 30 has provided no justification for failure to furnish copies of all employee health benefit plans and copies of all current job descriptions pursuant to the Union's letter of February 28. Orheim merely asserted that he did not know such documents existed. There is no evidence that any investigation was undertaken by Respondent in order to determine whether such documents existed. This constitutes a failure to use due care. I find, accordingly, that Respondent violated 35 the duty to furnish information by failing to furnish copies of all employee health benefit plans and copies of all current job descriptions pursuant to the Union's letter of February 28.

Similarly, Respondent's failure to furnish documentation of disciplinary notices for the period requested, February 2002 to February 2003, pursuant to the Union's letter of 40 February 28 violated Respondent's duty to furnish information. Respondent furnished such documents for the period August 2002 to August 2003. Respondent's chief negotiator stated that, right or wrong, he limited the information provided based on the date of the Union's certification. This is a nonsensical response as the Union was certified on February 11, 2002. Respondent produced incomplete disciplinary notices on September 3. I find that by failure to 45 produce disciplinary notices in a timely manner and for the period requested, Respondent violated its duty to bargain in good faith.

On May 30, Respondent provided drivers' logs for the period December 1, 2002 through 50 May 30, 2003. However, the Union's March 11 request was for the period September 2002 through March 2003. Thus, the Union did not receive drivers' logs for September, October, and

November 2002. No justification was advanced for the failure to produce the requested documents. Failure to produce the requested documents violates Section 8(a)(1) and (5) of the Act.

5 The Union’s June 5 request for copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year went unanswered. The Union’s June 5 request for the make, model and serial number of the radar unit used to determine speed violations was answered by letter of July 12. Orheim stated that Dunfee would supply the make, model and serial number. In late July or early August, Skjelstad received the manufacturers booklet for the radar gun. This satisfied Skjelstad’s need for the make, model and serial number of the radar unit but it was provided in an untimely manner. This information was requested in order to prepare for negotiation of Jones’ discharge for speeding. The parties discussed the Jones discharge during negotiations on July 7. There is no evidence that the requested information was unavailable or could not be provided within a reasonable time. Failure to provide this information in a timely manner violates Respondent’s duty to bargain collectively in good faith.

2. **Failure to Bargain over the termination of employee Brady Jones**

20 a. **Facts**

At the beginning of bargaining for the initial contract, there was no grievance/arbitration process in place. Skjelstad testified that at the first negotiation meeting, the Union was instructed to talk with Dunfee about all employee discipline during negotiation of the contract.

25 Unit employee Brady Jones was discharged for speeding on May 22. During a telephone conversation on May 28 between Skjelstad and Dunfee and by a letter of June 5, the Union requested that Respondent bargain over the termination of Jones. During the May 28 phone conversation, according to Skjelstad, Dunfee refused to bargain about the decision to terminate Jones. Dunfee did not contradict this testimony.

30 However, Orheim raised the issue of the Jones’ termination at the fourth negotiation meeting, held July 7. According to Orheim, the Union’s position was that Respondent should have bargained before terminating Jones. Orheim responded that Respondent’s long-standing safety rules covered this termination. According to Orheim, the parties discussed the issue to see if there was a remedy acceptable to both parties. Following discussion by the parties, according to Orheim, Respondent determined that nothing offered by the Union changed their mind about the discharge. Sinclair, Dunfee and Orheim caucused and decided that there was no reason to reverse the termination. According to Skjelstad, Orheim stated that Respondent would not discuss the issue of termination further. By letter of July 11, Orheim stated, “It appears the action taken in this case by management is reasonable and the Company sees no basis to reverse the action taken in this case.”

45 b. **Analysis**

In *Crestfield Convalescent Home*, 287 NLRB 328 (1987), remanded, 861 F.2d 50 (2d Cir. 1988), supplemented 295 NLRB 525 (1989), relied upon by General Counsel, the Board stated,

50 A grievance about a discharge is clearly a mandatory subject of bargaining. The Respondent discharged Chesky on 6 March. On 10 March the Union first asked the Respondent to meet and discuss the discharge. Additional written requests

were made on 11 March and 24 March. The Respondent consistently declined these requests both orally and in writing. It was not until 11 April that the Respondent reversed its position and agreed to meet concerning Chesky's termination. Accordingly, we find that the Respondent's initial refusal and resultant delay in bargaining violated Section 8(a)(5).

See also, *N.K. Parker Transport*, 332 NLRB 547, 551 (2000); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991), relied upon by the General Counsel, applying *Crestfield* to negotiations over termination of employment in the absence of a finalized initial contract.

As the facts are undisputed, I find that by failure to negotiate about the discharge of Brady Jones, when initially requested to do so, and the resulting delay in discussing the matter violated Section 8(a)(1) and (5) of the Act.

3. Failure to Bargain in Good Faith

a. Facts

Seven bargaining sessions were held for purposes of negotiating a collective-bargaining agreement. The sessions were held at the Union hall on April 17, May 6, June 6, July 7, July 17, August 29, and November 12. The Union's lead spokesman was business representative and organizer Jerry Skjelstad. Respondent's lead spokesman was negotiator Al Orheim. Also regularly attending the sessions on behalf of Respondent were regional manager Bill Dunfee and divisional manager Eddie Sinclair. Regular participants for the Union were business agent Ed Rogers, and employee Leon Poitras. Joe Burch attended one session.

In any event, the complaint alleges that Respondent's overall conduct, including interrogations, threats, discharges, failure to bargain with the union regarding a termination, and failure to provide information, as well as Respondent's specific bargaining proposals, allegedly intended to thwart the parties' agreement on a collective-bargaining agreement, constitute evidence of bad faith bargaining. The specific proposals cited in the complaint and the evidence adduced at trial regarding these proposals is as follows:

- A wage freeze, following a promise of increased wages --

At a mandatory pre-election meeting in December 2002, Orheim told employees that his job was to crush the Union. Orheim told employees that if they voted against the Union, they would receive the same raise that was given to employees in Southern California after those employees decertified the Union.

At the first negotiation session, the Union presented its proposed contract. Orheim stated that Respondent would present its proposed contract at the following session and, according to Skjelstad, Orheim stated that Respondent would propose increased wages and benefits. Orheim testified that he said Respondent was open to increased wages and benefits. At the second meeting, Respondent presented its proposals, including Respondent's proposed wage freeze. No benefits were included in the proposal. Skjelstad noted that Respondent paid more to its Southern California drivers after they decertified. Respondent did not move on its wage freeze proposal.

- Shifting reasons for not proposing wage increases allegedly in order to release Respondent from a duty to furnish information --

According to Skjelstad, when Respondent presented its wage provision on May 6, Orheim stated that Respondent's jobs were minimum wage jobs. However, he added in the same breath that Respondent paid more than its competitors. In fact, Respondent paid minimum wage in Northern California but higher than minimum wage in Southern California.

5

- A broad management rights clause that would give Respondent sole and exclusive control over the terms and conditions of employment while waiving the Union's right to prior notice and bargaining –

10

Respondent's management rights proposal, presented on May 6 at the second negotiation session, allowed, in relevant part, layoff of employees without bargaining, assignment of supervisors to perform bargaining unit work without bargaining, subcontracting or contracting out unit work without bargaining, and transferring work between locations without bargaining. Respondent did not modify this proposal in its July 7 counterproposals.

15

Regarding the management rights clause, the Union complained that it was so broad that the Union would have no input regarding employees' terms and conditions of employment. The Union stated that Respondent's language was overly broad. It allowed Respondent to terminate employees for refusing to cross picket lines, for exercising the right to strike, and for crossing a picket line sanctioned by the union.

20

- A no-strike clause that prohibited work stoppages for any reason during the term of the agreement, while at the same time proposing a limited grievance arbitration procedure that provided for arbitration of only a select few grievances --

25

Respondent's no strike proposal, also presented on May 6 at the second negotiation session, gave Respondent the "sole and exclusive right to determine the discipline given the employee or employees for such a breach of [the no strike clause]. Employees disciplined or discharged pursuant to this section shall have no further recourse for such discipline."

30

Respondent's no strike proposal, presented at the fourth negotiation session, stated, in part, "There shall be no . . . honoring of any picket line whatsoever after having been warned of the consequences by management . . . sympathy strike . . . or any other form of economic pressure . . ." The union stated that Respondent's proposal was too restrictive and would provide no strike protection for employees to participate in a job action or to cross a picket line. Respondent's position was that crews had to be transported across picket lines. The union requested that crews be left across the street from picket lines and the crews could walk across the line. Respondent rejected this position and stated that the crews had to be driven across picket lines.

40

At the fifth session, the Union presented its counter proposal on Respondent's no-strike clause. The Union proposed that employees be allowed to honor picket lines sanctioned by the Joint Council of the Union. Respondent rejected this proposal. At the seventh meeting, held on November 12, Respondent offered to remove the provision giving it the sole and exclusive right to determine discipline for breach of the no-strike clause. The Union stated that it was a meaningless deletion because under Respondent's proposed grievance and arbitration proposal, Respondent had the final authority over all grievances except in certain instances not involving termination or suspension greater than three days or violation of safety requirements or mandated by the customer.

50

Respondent’s initial grievance proposal, presented on May 6, contained no provision for arbitration of any grievances. The proposal provided, in part, that “Grievances shall not be filed, discussed, investigated or otherwise processed during working time.” Section 7 provided, “Awards resulting from grievances challenging the accuracy of an employee’s seniority date or pay rate will be limited to a period not exceeding thirty (30) days prior to the filing of the grievance.” Section 8 declared, “The decision of the Company arising from section 6 [the third step] shall be final and binding upon the parties.”

On July 7, Respondent modified its grievance proposal by adding three new sections, as follows:

Section 9. Disciplinary action resulting in the termination or suspension greater than three (3) days of an employee may be submitted to arbitration if not resolved under the procedure outlined above unless the suspension or discharge is the result of a violation of Renzenberger’s safety requirements or is mandated by a customer. . . .

Section 10. The decision of the arbitrator shall be final and binding upon the parties.

Section 11. The expenses incurred during arbitration shall be borne equally by the Union and the Company. The parties will pay their own expenses for legal fees.

- A zipper clause that would waive the Union’s right to collective bargaining during the term of the agreement --

Article 20, Section 1 of Respondent’s initial proposal stated that Respondent would not be bound by “any past understandings, practices and/or customs between the Company, its employees and the Union on matters not specifically governed by the terms of this agreement.” Article 20, Section 2 of Respondent’s initial proposal stated,

The parties acknowledge that during negotiations, which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all subjects of collective bargaining. The understandings and agreements arrived at by the parties after the exercise of said rights are set forth in this agreement. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and clearly waive the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

Article 20 was not modified throughout the course of negotiations.

- A union security clause which would provide that payment of dues was not a condition of employment –

In addition to acting as chief negotiator for Respondent, Orheim also conducted Respondent’s pre-election meetings with employees. In December 2002, prior to one of these meetings, Orheim met with Weston Davis, at that time regional manager at Roseville, and Eddie

Sinclair, division manager. Orheim told Davis and Sinclair that in the event the Union won the election, his strategy would be to insist on no union security clause. Orheim explained that in a similar situation in the Midwest, he had negotiated to impasse on an open shop clause. The union there had signed the agreement but when it came up for renewal, the union walked away
 5 because only two members of the bargaining unit had actually become members.

Initially, Respondent made no proposal regarding union security in its proposal of May 6. However, after the Union stated on June 6 that union security was an important issue in reaching agreement, on July 7 Respondent proposed Article 21, a union security clause, in
 10 relevant part, as follows:

Section 1. The Company and the Union shall jointly notify all members of the unit that they should pay dues and/or a service representation fee. It is understood that such payment is not a condition of employment nor is it a condition of
 15 continued employment. The Company’s Human Resource Dept. shall notify the Union of all new hires.

Section 2. During the life of this agreement, the Company agrees to deduct Union membership dues levied by the Union from the pay of those employees who have signed an authorization card that remains in effect with the consent of
 20 the employee and tender such withholdings to the Union. The Union shall hold harmless and indemnify the Company for any legal action resulting from this withholding.

25 * * * * *

Section 4. The parties agree that the Company has the right to approve any authorization card that may be used by the Union in this article. The Company will not recognize any authorization card that has not had its content approved by
 30 the Company.

The Union objected to Respondent’s proposed union security language stating that California was not a right to work state. Respondent replied that payment of fees and dues could not be a condition of employment because employees would quit and Respondent would
 35 not be able to hire anyone. Skjelstad told Respondent that the Union had to have union security and grievance/arbitration language and it would be flexible on all other issues. During a lengthy discussion on union security, Orheim stated that he would like to offer benefits and wages in place of union security. However, this did not happen. Orheim stated that it was difficult to offer wages and benefits due to Respondent’s transportation agreement with Union Pacific. The
 40 parties also had a lengthy discussion regarding Respondent’s management rights proposal.

b. Analysis

In *Hydrotherm, Inc.*, 302 NLRB 990, 994-995 (1991)(and cases cited therein), the Board set forth general principles regarding the duty to bargain in good faith, paraphrased as follows:
 45

1. The totality of a party’s conduct, both away from the table and at the table, including the substance of the proposals on which the party insists, must be examined in order to determine whether the party has bargained in good faith, making a genuine effort to reach agreement, or in bad faith, with an intent to
 50 frustrate the bargaining process.

2. An employer’s proposals may be assessed by comparison to the rights a union possesses by virtue of its status as the employees’ exclusive bargaining representative.

5

3. An employer may insist on comprehensive waiver of important employee rights in return for significant employer movement on important subjects. An employer may not insist on comprehensive waiver of important employee rights while “offering little more than the status quo in return for these sweeping waivers.”

10

4. Good-faith bargaining may be quite hard but, nevertheless, lawful.

Orheim’s statements to employees and to Davis and Sinclair indicate that Respondent intended to engage in a predetermined course of conduct that would erode employee support for the Union and make contractual agreement impossible. Thus, Orheim told employees he would crush the Union. He told them that if they voted to have no union, they would receive a pay increase but if they voted for a union, wages would be frozen. Orheim told Davis and Sinclair that if the union were elected, he would embark on a course of conduct that would ultimately defeat the union.

15

20

Thereafter, Respondent engaged in its calculated course of conduct in negotiations by

- insisting on a wage freeze for several differently articulated reasons;
- insisting on a broad management rights clause and zipper clause which waived Respondent’s duty to bargain during the term of the contract;
- insisting on no right to strike and exclusive disciplinary authority in the event of a strike;
- insisting on final authority to determine all grievances including any action taken for violation of safety rules or at the request of its customer except those involving termination (for other than safety rules, customer request, or by incorporation, violation of the no-strike clause) and for suspensions of greater than three days, with the same exceptions as those for termination; and
- insisting on no union security clause in the contract.

25

30

35

These proposals go beyond hard bargaining. The employees would have been better off without a contract and without an exclusive bargaining representative. Employees had no wage increase, little right to arbitrate, and no right to strike. Employees could be laid off or locked out while Respondent contracted out their work, used management to do their work, or used temporary employees to perform their work. The Union had no ability to collect financial support for its work and no ability to bargain during the term of the contract for any reason whatsoever. The Union had no role in employee wages, employee personnel decisions, or assignment of unit work. Respondent requested these statutory waivers without offering anything in return.

40

45

Respondent argues that the parties agreed on Union recognition, it compromised on grievance and arbitration, it compromised on management rights by agreeing to delete its unilateral right to transfer of work, and compromised on no-strike, no-lockout by stating it would

50

consider deleting the provision giving it exclusive authority to discipline employees for violation of the no-strike clause. Although acknowledging that some of its initial proposals were broad, Respondent argues that it was ready to compromise and, indeed, changed its position on numerous proposals.

5

Contrary to Respondent's assertions, I find that Respondent made only inconsequential concessions and at the same time rigidly adhered to its positions on union security and grievance/arbitration, after the Union averred that these topics were important for it to reach agreement.

10

Based on the totality of the circumstances, I find that Respondent offered nothing more than the status quo while insisting on sweeping waivers. Respondent's proposals alone would have resulted in the union having fewer rights than it would have by reliance on its certification. When considered against the backdrop of refusal to provide information necessary for bargaining, refusal to bargain about termination of an employee, discharge of two Union adherents, and interrogation and threats, I find that Respondent failed to sincerely reach agreement and, thus, failed to bargain in good faith.

15

Conclusions of Law

20

1. By interrogating and threatening its employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
2. By discharging employee Renae Halverson and warning, suspending, and discharging employee Joe Burch, Respondent violated Section 8(a)(1) and (3) of the Act.
3. By failing to provide the Union with information necessary for and relevant to its duties as the exclusive collective-bargaining representative of unit employees, failure to bargain about the termination of unit employee Brady Jones, and failure to bargain in good faith, Respondent violated Section 8(a)(1) and (5) of the Act.

25

30

35

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

40

The Respondent, having discriminatorily discharged Renae Halverson and discriminatorily warned, suspended, and discharged Joe Burch, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

45

With regard to my finding that Respondent unlawfully refused to bargain with the Union about Jones' termination or delayed meeting with the Union about Jones' termination, I note the Board's comment in *Crestfield Convalescent Home, supra*, 287 NLRB 328 at n. 6, that because respondent therein did eventually meet with the Union regarding the discharge, it was unnecessary to order any affirmative remedial action. The circumstances in this case are

50

different, however. Although the parties agree that Orheim did eventually agree to discuss the Jones termination, none of the information requested by the Union had been produced at that time. Thus, the Union did not have a copy of Jones' written termination; records of prior discipline of Jones; notes regarding the termination; other disciplinary actions taken by Respondent for the prior year; the make, model and serial number of the radar unit; maintenance history of the radar unit; and training courses taken by the operator of the radar unit. Under these circumstances, the discussions of Jones' termination at the July 7 negotiation session were meaningless. Accordingly, under the circumstances herein, I will recommend an affirmative remedy.

Counsel for the General Counsel has requested the extraordinary remedy of reimbursement of employee negotiators for earnings lost while attending negotiations and reimbursement of the Union for costs and expenses incurred in the preparation and conduct of negotiations after April 17, the first negotiation session. The Board will order reimbursement of negotiation expenses when "Respondent from the beginning of negotiations deliberately pursued a course of conduct designed to frustrate bargaining and make all negotiations a fruitless waste of time." *M.F.A. Milling Co.*, 170 NLRB 1079, 1080 (1968), *enfd sub nom. Local Union 676 v. NLRB*, 463 F.2d 953 (D.C. Cir. 1972). I find such circumstances herein and recommend that employee negotiators be made whole for their loss of earnings while attending negotiations from May 6 until November 12 plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Similarly, I recommend that the Union be made whole for costs and expenses incurred in preparation and conduct of negotiations after April 17, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that this award is governed by the decision in *Frontier Hotel*, 318 NLRB 857 (1995), modified 118 F.3d 795 (D.C. Cir. 1997), I find that there were no significant issues of credibility involved in my finding of bad faith bargaining, or for that matter, in any of my findings of conduct violative of Section 8(a)(1) and (5) of the Act.

Finally, based upon the nature of the violations found, the number and extent of bargaining sessions, the pervasive and extensive impact of other unfair labor practices on the bargaining process, and the conduct of the Union during negotiations, I recommend that the certification year be extended for one year consistent with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). This will ensure that the Union has one year of good faith bargaining during which its majority status may not be questioned.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

Respondent, Renzenberger, Inc., Roseville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - a. Coercively interrogating employees about their intentions to go on strike;

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 b. Threatening employees that they would lose their jobs if they went on strike and that they would be fired and lose their jobs if they went on strike;
- 10 c. Warning, suspending, and discharging employees for supporting Chauffeurs, Teamsters and Helpers, Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO;
- 15 d. Failing and refusing to provide the Union with copies of all employee health benefit plans and copies of all current job descriptions and disciplinary notices for the period February 2002 to February 2003;
- 20 e. Failing and refusing to provide drivers' logs for the period December 2002 through May 2003;
- 25 f. Failing and refusing to provide all disciplinary notices, warnings or records of disciplinary personnel actions for the period June 5, 2002 to June 5, 2003, and failure to timely provide information regarding the make, model and serial number of the radar unit used to determine speed violations.
- 30 g. Failing and refusing to bargain over the termination of unit employee Brady Jones;
- 35 h. Failing and refusing to bargain in good faith with the Union; and
- 40 i. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 45 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - 50 a. Within 14 days from the date of the Board's Order, offer Renae Halverson and Joe Burch full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - b. Make Renae Halverson and Joe Burch whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.
 - c. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warning, suspension, and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the warning, suspension, and discharges will not be used against them in any way.
 - d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records

and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 e. On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

10 All full-time and regular part-time road and yard drivers employed by Respondent at its Richmond, Oakland, Dunsmuir, Stockton, Fresno, and Roseville, California locations; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

15 f. Within 14 days after service by the Region, post at its facilities in Richmond, Dunsmuir, Stockton, Fresno, and Roseville, California,⁶ copies of the attached Notice marked “Appendix.”⁷ Copies of the Notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since February 28, 2003

20 g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 Dated June 9, 2004
San Francisco, California

30
35 _____
Mary Miller Cracraft
Administrative Law Judge

40 _____
45 ⁶ All of these locations are affected by the Sec. 8(a)(5) findings. The parties agree that Respondent’s Oakland, California operations have ceased.

50 ⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you that you will lose your job if you go on strike and that you would be fired and lose your job if you go on strike.

WE WILL NOT warn, suspend, or discharge employees for supporting Chauffeurs, Teamsters and Helpers, Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO.

The National Labor Relations Act requires that the Union be promptly furnished with relevant information necessary for the proper performance of the Union's duties. Therefore,

WE WILL NOT fail and refuse to provide the Union with copies of all employee health benefit plans, copies of all current job descriptions, and disciplinary notices for the period February 2002 to February 2003. This information is relevant to the Union's duty to bargain for a contract.

WE WILL NOT fail and refuse to provide drivers' logs for the period December 2002 through May 2003. This information is relevant to the Union's duty to investigate potential employee grievances.

WE WILL NOT fail and refuse to provide all disciplinary notices, warnings or records of disciplinary personnel actions for the period June 5, 2002 to June 5, 2003, and information regarding the make, model and serial number of the radar unit used to determine speed violations. This information is relevant to the discharge of a unit employee for speeding.

WE WILL NOT fail and refuse to bargain over the termination of unit employee Brady Jones.

WE WILL NOT fail and refuse to bargain in good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Renae Halverson and Joe Burch full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Renae Halverson and Joe Burch whole for any loss of earnings and other benefits resulting from their warning, suspension, or discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Renae Halverson and the unlawful warning, suspension, and discharge of Joe Burch, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL bargain with the Union regarding termination of unit employee Brady Jones.

WE WILL provide the Union with copies of all employee health benefit plans, copies of all current job descriptions, and disciplinary notices for the period February 2002 to February 2003, drivers' logs for the period December 2002 through May 2003, all disciplinary notices, warnings or records of disciplinary personnel actions for the period June 5, 2002 to June 5, 2003, and information regarding the make, model and serial number of the radar unit used to determine speed violations.

RENZENBERGER, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5139.